

IN THE MATTER OF THE ARBITRATION BETWEEN

Minnesota State College Faculty

ASSOCIATION

-and-

MSCF #: LS-06-01

Employer #: 1055

Minnesota State Colleges & Universities

Lake Superior College

EMPLOYER

ARBITRATOR: Christine D. Ver Ploeg

DATE AND PLACE OF HEARING: September 12, 2006
Lake Superior College
Duluth, Minnesota

DATE OF RECEIPT OF POST-HEARING BRIEFS: November 2, 2006

DATE OF AWARD: November 19, 2006

ADVOCATES

For the Association

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GRIEVANTS

Class action:

Lee Andresen, Jude Collins, Perveen Jawaid, John Jelatis, Barb Struck and Bernadette Savage

ISSUE:

Did the Employer violate the terms of Article 17, Subd. 4, when it rejected the sabbatical plans of Union faculty members Lee Andresen, Jude Collins, Perveen Jawaid, John Jelatis, Barb Struck and Bernadette Savage?

BACKGROUND

This case has been brought by the Minnesota State College Faculty Association (hereinafter (“Association”) on behalf of the Grievants, all of whom are employed as full-time faculty members by the Minnesota State Colleges and Universities System, Lake Superior College in Duluth. (hereinafter “Employer”). The Association is the Grievants’ exclusive representative.

The dispute which gives rise to this arbitration stems from the Employer’s denial of the sabbatical proposals each Grievant submitted in December of 2005 for a sabbatical during the 2006-2007 academic year. The Association submits that the Employer’s rejection of these proposals violates the parties’ Agreement, Article 17, Section 4; the Employer submits that it does not.

In 1995 the Minnesota State Colleges and Universities System was created (MnSCU). In the wake of that restructuring--and at the same time the Minnesota legislature passed the Omnibus Education Bill, in part to hold high state’s higher education system more accountable--the parties negotiated their 1995-1997 collective bargaining agreement. At that time there was much spirited debate concerning amending prior sabbatical provisions. The resulting language states:

“[a] sabbatical leave shall be granted to unlimited full-time, temporary full -time and unlimited part-time faculty who meet the following criteria. . .” Article 17, Section 4, subd. 1

The contract then sets forth 5 criteria that address:

- A. Years and semesters of service requirement and how that is calculated,
- B. An applicant’s plan must meet the “Purpose” of a sabbatical as described in the Agreement,
- C. Requirements concerning the availability of replacements,
- D. Funding availability
- E. The manner by which the number of available sabbaticals is calculated

Only Part B is now at issue. That second criteria requires:

The faculty member has submitted a plan for a sabbatical leave that is designed to serve the purpose described above.

Article 17, Section 4 defines the “purpose” of a sabbatical as:

[T]o give faculty members the opportunity to secure additional education, training, or experience which will make them better prepared for carrying out their college assignments, and will support the professional development of the faculty, the development needs of academic departments or areas, and the planned instructional priorities of the college/system mission.

The number of available sabbaticals is calculated per the overall budget and per the number of faculty who can be gone at one time from each department. Sabbaticals are granted by seniority among faculty who survive the screening process and whose plans are approved.

On September 27, 2005, the Employer sent a notice to all faculty that outlined the sabbatical leave application process for leaves during the 2006/2007 Academic Year. That notice indicated that faculty members seeking a sabbatical leave for the following academic year should turn their plans into the Vice President of Academic Affairs between November 24 and December 15. The notice also suggested that faculty members should submit their applications early to permit discussion with the faculty member's appropriate dean.

Sabbatical requests are submitted on a standard form that contains areas for an applicant to identify the length of the sabbatical and provide specific details and the projected outcome(s). The form, which each Grievant signed, states:

The plan will be of mutual benefit to the college and to ...I understand that this plan requires both the recommendation of the responsible administrator and/or the dean, and approved by the college president..."

Several, but not all, of the Grievants submitted their plans early and had an opportunity to discuss them with their deans. Between November 26th and December 14th the Grievants formally submitted their sabbatical leave plans to the Vice President of Academic Affairs at the College. Once a sabbatical plan was submitted, no further changes were made.

On December 20, 2006, a team of administrators at Lake Superior College—including deans and the Vice President of Academic Affairs—met to review all of the sabbatical plans submitted for the following academic year. Witnesses have testified that the Employer adopted this new and more rigorous team approach because of concerns that there had previously been minimal review of the content of proposed sabbatical plans. Witnesses also testified that during division meetings before the December 15 due date the Employer notified faculty of the new

team review process and encouraged faculty members to discuss their plans with their dean. The purpose of such discussions would be to ensure that a plan satisfied the college/system's mission as well the College's expectations concerning rigor and substance. Some Association witnesses and the local president testified that they were never advised of the new team review process.

The results of the team review were forwarded to the College Human Resources Department which in turn forwarded to the Office of the Chancellor the names (but not the plans) of all sabbatical applicants, indicating which plans were approved and which were denied. Central office then conducted the mechanical process of confirming that the faculty members whose plans had been approved were otherwise eligible per the criteria set forth in Article 17, Subd. 4 (e.g. length of service, availability of funds, replacement personnel). Central office staff members then ranked eligible faculty in order of seniority per the contract.

The Grievants were then notified that the sabbatical plans they had submitted were rejected by a committee of Lake Superior College administrators and thus they would not be eligible for sabbatical leave during the 2006/2007 academic year.

On behalf of these Grievants the Association filed a timely grievance protesting the Employer's rejection of the sabbatical proposals now at issue. The parties were unable to resolve their differences concerning this matter in earlier steps of the grievance process, and have agreed that this dispute is now properly before the arbitrator for resolution. The parties and the arbitrator met for a hearing on this matter on September 2, 2006, and the parties submitted post-hearing briefs which the arbitrator received on November 2, 2006.

RELEVANT CONTRACT LANGUAGE

The Parties' current Collective Bargaining Agreement provides in relevant part:

Article 17, Professional Development

Section 4, Sabbatical Leave

The purpose of sabbatical leaves is to give faculty members the opportunity to secure additional education, training, or experience which will make them better prepared for carrying out their college assignments, and will support the professional development of the faculty, the development needs of academic departments or areas, and the planned instructional priorities of the college/system mission.

Section 4, subd. 1, Sabbatical Leave Criteria

A sabbatical leave shall be granted to unlimited full-time, temporary full -time and unlimited part-time faculty who meet the following criteria. . .”

B. The faculty member has submitted a plan for a sabbatical leave t hat is designed to serve the purpose described above.

Article 17, Section 4, Subd. 2, Application Procedure

...Notification of the approval or rejection will be provided by the college president or designee no later than February 15... if a faculty member desires to change the substance of the plan that was previously approved by the college president or designee, the faculty member shall...

ASSOCIATION’S EVIDENCE AND ARGUMENT

The Association asserts that the funding that is set aside for sabbaticals is and must remain under the control of faculty members. The Association acknowledges the Employer has the right to screen proposals to determine if they meet the Agreement’s five criteria. However, when a proposal meets those requirements (which the Association submits each proposal has been shown to have fulfilled) then the Employer must approve that proposal and sabbaticals must be awarded to the most senior faculty members until the number of available sabbaticals is filled. The Association argues the Employer has no right to evaluate, score or rank a proposal’s content and reject a plan for reasons beyond this initial screening. That is, the Employer has no right to reject otherwise qualifying proposals on grounds that they are, for example, allegedly insufficiently demanding.

EMPLOYER’S EVIDENCE AND ARGUMENT

The Employer argues that the final decision must always ultimately remain in its hands. Funding the sabbatical process costs the system \$5.5 M each biennium, and for any other body or person to decide how this money is spent is unacceptable. The Employer has—and has always had—the right to accept or reject a proposal based upon merit; faculty members cannot decide for themselves what fulfills the contract requirements.

DISCUSSION AND DECISION

In this case the Association has had the burden of proving that the Employer's rejection of the sabbatical proposals at issue violated Article 17, Section 4 of the parties' Agreement. In concluding that the Association has met that burden, it has been necessary to walk a middle path between the all or nothing positions that each party appears to have adopted in this case.

1. Framing the case

It has been difficult to crystallize the parties' positions in this case. The Employer would argue that the confusion is due to the changing natures of the Association's grievance. It is true that initially the Association brought this grievance charging that the Employer violated the Agreement by not forwarding the names of six individuals and their sabbatical applications to the system office. Upon learning that the Employer had, in fact, forwarded the Grievants' names—but not their plans—the Union then protested what it understood to be the Employer's failure to evaluate the Grievants' eligibility. When the Employer informed the Association that it had not evaluated the Grievants' eligibility because their College had not approved their sabbatical plans, the issue then became whether the Employer has the right to approve or reject a sabbatical plan.

The difficulty this case presents is found in what appear to be two intertwined lines of argument the parties have advanced. The parties agree that all six proposals met four of the five criteria identified in the Agreement. This would suggest that the only question is whether they also met the fifth criteria: i.e., a proposal must be shown that it : "...is designed to serve the purpose described above." Indeed, the Association argues that these proposals do meet the contract's stated "purpose"¹ while the Employer argues that they were rejected because they did not.

If this is the question, then the related issues this decision must address are: (1) does an arbitrator have authority to review rejected proposals, if so (2) by what standards are the

¹ Article 17, Sec. 4 defines the requisite "purpose:"

To give faculty members the opportunity to secure additional education, training, or experience which will make them better prepared for carrying out their college assignments, and will support the professional development of the faculty, the development needs of academic departments or areas, and the planned instructional priorities of the college/system mission.

Employer's decisions concerning these proposals to be reviewed, and (3) did the Employer improperly reject one or more of the Grievants' plans? These are straightforward questions.

However the parties have offered evidence and arguments that extend beyond these questions to embrace broader questions of authority.

The Association argues that after initially screening a proposal, the Employer has no right to consider that proposal's content/merit. The Association offered much evidence and argument to support its claim that the Employer cannot direct how the substantial sums allocated to sabbaticals are to be used. The Association argues the contract does not provide the Employer with any right of final approval; this is not a discretionary provision.

The Employer, by contrast, submits that the College must always have the exclusive right to approve or reject a faculty member's sabbatical plan. It is eminently reasonable to demand that the product of a paid sabbatical benefit not only the faculty member but also have sufficient rigor and substance to support the College's mission and contribute to student education. In short, the Employer submits that it does have the right to direct a plan's content.

These are broadly stated positions that seem to leap over the most immediately apparent question: doesn't the Employer's acknowledged right to determine if a proposal fulfills the fifth criteria—(i.e., that it meet the defined "purpose" of a sabbatical)—carry with it the inherent right to consider the merit of its content? That is, the contract defines "purpose" to contain the following components:

1. to give faculty members the opportunity to secure additional education, training, or experience which will make them better prepared for carrying out their college assignments,
2. to support the professional development of the faculty (in essence, a restatement of the first criteria),
3. support the development needs of academic departments or areas, and
4. support the planned instructional priorities of the college/system mission.

Surely the Employer has the right to reject a sabbatical proposal which--although it might bear some relationship to the above components--is nevertheless so remote from department/institutional needs/priorities, or is otherwise so undemanding, that it cannot

reasonably be said to fulfill the “purpose” criteria. The Employer’s role is not limited to simply screening a proposal to see if, on its face, it arguably addresses the five criteria. To screen a proposal to determine if it fulfills the “purpose” criteria is to evaluate the rigor and value of that proposal.

Thus, the questions this case presents are, indeed: (1) does an arbitrator have authority to review rejected proposals, if so (2) by what standards are the Employer’s decisions concerning these proposals to be reviewed, and (3) did the Employer improperly reject one or more of the Grievants’ plans?

2. Does an arbitrator have authority to review rejected sabbatical proposals?

The parties have stipulated that this matter is properly before the arbitrator, and there has been no challenge to arbitrable review of the plans themselves. In addition, nothing in the parties’ Agreement, Article 17 or otherwise, precludes arbitral review of decisions regarding this benefit.

3. By what standards are the Employer’s decisions concerning these proposals to be reviewed?

In considering the standards for reviewing the Employer’s decision to reject a sabbatical proposal, it has been helpful to think through this case in the following fashion:

First, the “shall be granted” language is clear. Once a proposal has been found to meet all five criteria, that sabbatical must be granted in the order set forth in the Agreement. Proposals cannot “jump” the line because they are “better” than others (and no one has suggested they can).

Four of the five criteria are straightforward questions of time in service, coverage, etc. and will rarely, if ever, be at issue. However, the “Purpose” criteria is not a mechanical factor; it requires the College president (or designee) to scrutinize a proposal’s content and evaluate its merit. Such evaluation is integral to determining whether it meets departmental and institutional needs and priorities.

However, the Employer’s authority to accept and reject proposals because they do not meet the “purpose” criteria is not without limits. As with any exercise of authority, the Employer must always act in good faith and is always subject to challenge based on evidence that actions taken have been arbitrary, capricious and/or discriminatory.

Although the “arbitrary, capricious and/or discriminatory” test is typically viewed as a high standard of review, it is not as daunting as some fear. A fair sabbatical review process would contain the following elements, and the absence of any of these would give cause for concern and close scrutiny.

A. Fair notice

A faculty member is responsible for submitting a proposal that meets the criteria set forth in Article 17. To do this, the faculty member has the right to expect guidance concerning the criteria by which his or her proposal will be judged. To a great extent this guidance is provided by the language of the Agreement, reiterated in the sabbatical package forms including the very specific questions (and explanations) provided in the application form itself.

In addition, the Employer has a responsibility to further guide faculty members who seek assistance in crafting their proposals. A faculty member should not be “blindsided” by being misled as to the Employer’s expectations concerning what is and is not an acceptable proposal. In this case the Association has challenged the Employer’s providing of such guidance as “dictating content.” However, had the deans whose assistance was sought failed to offer suggestions, the Association could reasonably protest that applicants had unfairly been left in the dark concerning what would be necessary to survive the College president’s (or designee’s) review.

B. President’s acceptance or rejection of proposal

Once a faculty member has formally submitted a timely sabbatical proposal, the President must review it to determine if it meets the “purpose” criteria. In making this determination it is appropriate to rely upon the evaluations of designee(s) such as (in this case) a team that includes college deans and the Vice President of Academic Affairs.

The determination whether a proposal meets the “purpose” criteria by necessity must include examining its content and weighing its merit. The fact that a dean has earlier made suggestions concerning content, and the faculty member did not adopt any or all of those suggestions, is not a basis for rejecting a plan. Indeed, a faculty member’s failure to seek any prior guidance whatsoever is no basis for rejection. The plan must stand or fall on its own merit.

Academia typically envisions sabbaticals to embrace a broad range of activities and a proposal's content must be evaluated in that context. However, it is also true that a plan does not fulfill the "purpose" criteria when it proposes to do little more than what would otherwise be expected of a full-time faculty member in the regular course of his or her duties. Nor is "purpose" met when proposed activities are otherwise vague, undemanding or clearly tangential to department/institution needs and mission.

In short, the Employer cannot dictate content. However, the Employer can always evaluate whether a plan has sufficient content to meet the "purpose" criteria, and a faculty member has a right to obtain guidance on that question.

C. Articulating reasons for rejection

The College president (or designee) must evaluate proposals in good faith, and the rejection of a sabbatical plan is subject to arbitrable review per an "arbitrary, capricious and/or discriminatory" standard. While it is beyond an arbitrator's authority to order written explanations for all rejections, the absence of stated reasons not only leaves the Employer more vulnerable to claims that the arbitral review standard has been met, but also leads to the confusion that surrounded the filing of this grievance.² In this respect it is relevant that the current sabbatical packet form simply has the Employer check one of the following:

This sabbatical plan meets the purpose and criteria for a sabbatical leave, and therefore, I approve it.

This sabbatical plan is approved with the following conditions:"

This sabbatical plan is not approved.

² The Employer's failure to provide written reasons in this case created confusion in that: (1) the Association initially protested that the Employer had not forwarded the names of six individuals and their sabbatical applications to the system office in order to have their eligibility calculated as it should have been. (2) When the Association learned that the Employer had forwarded the Grievants' names, but not their plans, it then protested what it perceived to be the Employer's failure to evaluate the Grievants' eligibility. (3) When the Employer informed the Association that it had indeed not evaluated the Grievants' eligibility because their College had not approved their sabbatical plans, the issue then became either: (1) Did the Employer improperly conclude the plans did not meet the "purpose" criteria, or (2) does the Employer have the right to approve or reject a sabbatical plans?

Faculty members have a right to know, with specificity, wherein their plan fell short. Such information is important not only in deciding whether to challenge the Employer's decision, but to guide future proposals.

D. Applying the "arbitrary, capricious and/or discriminatory" standard

As noted, the "arbitrary, capricious and/or discriminatory" standard is typically viewed as daunting. However, it can be met upon a showing that the process was unfair, including evidence of disparate treatment. When an Employer (i.e., College president) rejects a sabbatical proposal, the Employer must be prepared to explain why that plan failed to fulfill the contract "purpose" while others offered for comparison qualified.

3. Applying the preceding analysis to this case

The preceding analysis applies to this case in the following ways:

A. Fair notice

On September 27, 2005, the Employer sent a notice to all faculty members that outlined the sabbatical application process for leaves during the following academic year. The sabbatical packet given to interested faculty members was detailed, and appears to have been the same packet provided in prior years.

The notice indicated that faculty members wanting a sabbatical leave for the following academic year should submit their plans to the Vice President of Academic Affairs between November 24 and December 15. It also encouraged applicants to complete their proposals in sufficient time to obtain guidance from their respective deans. Several, but not all, of the Grievants did take the opportunity to discuss their plans with their deans. Some, but not all, applicants adopted some or all of those suggestions. Once a sabbatical plan was submitted to the Vice President of Academic Affairs, no further changes were made.

The preceding process on its face appears to have given the Grievants fair notice of the Employer's expectations. However, there are additional factors that give pause. Most notably, the Employer has acknowledged that in the fall of 2005 it changed its review process because of concerns that in prior years there had been very little review of the content of proposed sabbatical plans. This appears to have been the first time the Employer adopted the more

rigorous team review process. Although the Employer asserts faculty members were informed of this new process in division meetings, Association witnesses and the local president testified that they were never so advised.

This evidence suggests that the Grievants may not have received fair notice that the Employer was now using a new process to scrutinize proposals more rigorously. The question is whether the Grievants were given fair notice that what might have passed muster before might not now, and there is evidence to suggest that they were not. The fact that the “rules of the game” changed in the fall of 2005 is illustrated by evidence that: (1) not all applicants saw the desirability of seeking their deans’ suggestions in crafting a plan that the review team would agree met the “purpose” of a sabbatical, and (2) unlike prior years, where very few plans were rejected, this year an extraordinary number—six—were not approved.

B. President’s acceptance or rejection of proposal

On December 20 the college administrative team reviewed the submitted proposals and recommended that these six proposals be rejected. Accordingly, the central office did not further consider the Grievants’ eligibility for a sabbatical and the Grievants were subsequently notified that the sabbatical plans they had submitted had been rejected by the College’s committee of administrators.

This process is reasonable. It was reasonable for the president to designate a committee of administrators to make these recommendations, and it was reasonable for the central office to decline to expend the considerable resources necessary to evaluate the Grievants’ eligibility per the remaining criteria, when they understood doing so would not make a difference.

C. Articulating reasons for rejection

Faculty members have a right to know, with specificity, wherein their plans fall short. The absence of stated reasons for rejecting these proposals led to the Association’s initial reasonable misunderstanding concerning those rejections, and has made it difficult to now assess the basis upon which those decisions were made. Although Employer witnesses testified that some Grievants did not seek their suggestions, and others did not adopt suggestions given, that is not a basis for rejecting a sabbatical proposal. Instead, the only proper basis for rejecting

the proposal of an otherwise eligible faculty member is that it does not fulfill the “purpose” of a sabbatical.

Granted, “purpose” embraces weighing the merit of a proposal’s content in the context of department/institution needs and mission. The Employer has the right to reject a proposal that is undemanding or too tangential. However, in the instant cases the Employer has not explained exactly why the proposals were rejected. The Employer has simply asserted it had the right to make this determination.

In response, the Association utilized the only means available to it to demonstrate that these proposals do fulfill the “purpose” criteria: it matched each proposal against the Employer’s lengthy and detailed “Planning Integration for Institutional Effectiveness: College Priorities & Strategic Directions.” This evidence, coupled with the witness’s testimony, established a *prima facie* case which the Employer’s evidence did not overcome.

D. Applying the “arbitrary, capricious and/or discriminatory” standard

As noted, the “arbitrary, capricious and/or discriminatory” standard is typically viewed as daunting. However, it has been met in this case by evidence that the Grievants were not given fair notice that the Employer was now subjecting proposals to more rigorous scrutiny. Moreover, the Association has demonstrated that these proposals should be given the benefit of the doubt in determining whether they met the “purpose” criteria. The Employer has failed to articulate a permissible reason for rejecting those proposals; failure to incorporate a dean’s suggestions does not in and of itself constitute a permissible reason.

4. Remedy

The Association has requested that all six Grievants be granted sabbatical leaves to begin Spring semester or in the fall of 2007, as the instructor chooses. The Association also requests that the requirement for the number of semesters an instructor must return to work before eligibility to retire be waived for these sabbatical applicants.

This request will be granted in part and denied in part. The purpose of this remedy is to put the parties in the same position as if the Employer had originally approved all six proposals.

First, it is undisputed that even if the Employer had originally approved all six sabbatical proposals, other requirements would have precluded at least one Grievant from receiving the

sabbatical. The parties should review the data to determine who falls within the scope of the relief now ordered.

Second, those who are made eligible for sabbatical leaves by this decision may choose whether to begin them this Spring semester or in the fall of 2007. However, the Employer may challenge this choice upon evidence that the timing poses a substantial burden to the educational program.

Third, the sabbaticals ordered are not in addition to sabbaticals that would otherwise regularly be available. Certainly no person currently on a sabbatical, or scheduled for one to begin spring semester, shall be “bumped” by this decision. However, to the extent possible the sabbaticals now ordered shall be in lieu of those that would otherwise be allotted to the College for the 2007-2008 academic year.

Persons who are awarded a sabbatical by this decision shall be deemed to have taken it during the time period for which they applied for purposes of determining their eligibility for retirement, for future sabbaticals, or for any other purpose for which timing might be relevant.

AWARD

For the above reasons, this grievance is hereby sustained. The remedy is set forth above. I will retain jurisdiction of this matter in the event that there is a dispute concerning the implementation of the relief awarded.

November 19, 2006

A handwritten signature in black ink, reading "Christine Ver Ploeg". The signature is written in a cursive, flowing style.

Christine D. Ver Ploeg, Arbitrator